

# Napster Opens Pandora's Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet

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*In the span of a mere decade, the explosion of the Internet into the American consciousness has influenced virtually every aspect of our society. One such area is the music industry and the enforcement of copyright. More specifically, the rise and apparent demise of Napster represents, depending upon one's ideological leanings, many of the best and worst implications of how the Internet may function to transform a society straddling millennia. The author first examines the history of Napster, the various stakeholders, and the legal issues raised by the file-sharing service. However, this is only part of the story. The more interesting question is to what extent Napster has become a catalyst for the normative re-conceptualization of copyright in society. The author examines the cultural and social forces unleashed and popularized by Napster. In light of Napster-like substitutes, enforcement problems, and imperfect market solutions, the author argues that the issues raised by Napster will be contested on a variety of fronts into the foreseeable future.*

"Right now, things are messy," admits Napster creator Shawn Fanning regarding the onslaught of lawsuits over Napster's operations, "[b]ut it's not as bad a situation as many would think."<sup>1</sup> With this statement, Fanning manages to encapsulate the current tempest surrounding Napster and other on-line services utilizing peer-to-peer (PTP) file sharing technology.<sup>2</sup> The emergence of the Internet as a means of communicating and exchanging information threatens copyright protection in a way unlike any previously encountered.<sup>3</sup> The recent past

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<sup>1</sup> Jenny Eliscu, *Napster Fights Back*, ROLLING STONE, June 22, 2000, at 29.

<sup>2</sup> See *infra* notes 11–15 and accompanying text (discussing PTP file-sharing technology).

<sup>3</sup> Says Jupiter Communications analyst Aram Sinnreich, "[t]he hype is justified. Network file sharing has profound implications for the business model of [all entertainment and content-based industries]." Adam Cohen, *A Crisis of Content*, TIME, Oct. 2, 2000, at 68 (internal quotation marks omitted). One such non-obvious example is the stitching-pattern industry. *Id.* Jim Hedgepath, president of Pegasus Originals, discovered that craft enthusiasts were downloading his artists' copyrighted work for free off of a website. *Id.* The threat of litigation caused the site to shut down, but within days the same bootlegs were available on an underground, members-only site. *Id.* "Many artists have gone, and many more will go," says Hedgepath. *Id.* (internal quotation marks omitted). "I've talked to a lot who are looking for

has witnessed numerous lawsuits as the music industry, amongst others, scrambles to protect the commercial value of their copyrights.<sup>4</sup> But Fanning's comment also betrays the hope of some that there is a light at the end of the tunnel. While the record companies view Napster and its progeny as the new menace on the horizon, others consider them a valuable tool not only to transform a music industry ripe for overhaul but also to effect a fundamental change in how copyrights are enforced on the Internet.

Part I of this note will focus on the background and technology of Napster: what it does and how it works. Part II will detail how the battle lines have been drawn, what the various interests of the different stakeholders are, and what arguments are being made both for and against Napster's legality.

Part III will examine the application of the current law to Napster. This part will specifically focus on various safe harbor provisions of the Digital Millennium Copyright Act (DCMA), the fair-use doctrine, and the substantial non-infringing use doctrine, as espoused in *Sony Corp. v. Universal City Studios, Inc.*<sup>5</sup> Analysis will show that, in accord with the decisions of the Northern District of California<sup>6</sup> and the Ninth Circuit,<sup>7</sup> Napster is engaging in copyright infringement within the current meaning of the law. This part will also briefly examine the likely reach of an anti-Napster precedent.

Part IV will explore my thesis that, regardless of the legal fate of Napster, the forces unleashed by Napster as a social phenomenon still threaten the music industry's enforcement of copyright on the Internet. First, I will examine three philosophies underlying and propelling Napster's meteoric ascension to popularity. Second, this part will discuss alternative PTP file sharing services and the various barriers to enforcement they pose. Third, potential market-based solutions to the enforcement problems will be discussed.

It is my contention that, due primarily to two core reasons—the popularization of more progressive and radical philosophies catalyzed by Napster and the enforcement issues posed by Napster-like substitutes—any market solution will be an imperfect one. As a result of these factors, the foreseeable future will witness an interaction of legal, philosophical, and economical forces as the music industry attempts to maintain the commercial value of its copyrights on the Internet. I propose that the ultimate resolution of these issues will depend

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something else to do." *Id.* (internal quotation marks omitted).

<sup>4</sup> See, e.g., *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000); *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d 624, 625 (C.D. Cal. 1998).

<sup>5</sup> 464 U.S. 417 (1984).

<sup>6</sup> *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000) [hereinafter *Napster I*].

<sup>7</sup> *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) [hereinafter *Napster II*].

upon the extent to which Napster's rise in popularity is truly indicative of a normative re-conceptualization of the proper role of copyright in music and society at large.

### I. HISTORY OF NAPSTER, MP3, AND PTP FILE-SHARING

Napster began as the brain child of then nineteen-year-old Shawn Fanning.<sup>8</sup> The Napster program was originally a way for Fanning to trade music in the MP3 format with friends located throughout the country. Fanning and his friends were having trouble finding files they wanted, and the idea was to create a way for people to search for files and talk to each other.<sup>9</sup> The program went up in September 1999, and struck a resonant chord with music fans, as the number of users began to double every five to six weeks.<sup>10</sup>

Napster facilitates the trading of individual songs in the MP3 format.<sup>11</sup> A common misconception is that when someone downloads a song, the source of that song is Napster itself. However, Napster in its most basic form is a searching and indexing program. Users download a program called MusicShare from the Napster website, which allows them to interact with Napster's server-side software. When each individual user logs in to Napster with the use of a password, the MusicShare software reads the names of MP3 files that the user has made available to others. The Napster software then compiles, in real-time, a list of all available songs from all users who are currently logged into the Napster system.<sup>12</sup> Napster next performs a search function whereby users enter a desired

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<sup>8</sup> Steven Levy, *The Noisy War Over Napster*, NEWSWEEK, June 5, 2000, at 49. The name Napster was a childhood nickname of Fanning's. *Id.* at 50. As a freshman at Northeastern University in Boston, Fanning developed the Napster software in his dorm room in January, 1999. Rob Sheffield, *The Most Dangerous Man in the Music Biz*, ROLLING STONE, July 6–20, 2000, at 42.

<sup>9</sup> Levy, *supra* note 8, at 50.

<sup>10</sup> *Id.*

<sup>11</sup> MP3 technology was first created by the Motion Picture Experts Group in the early 1980s as the audio portion of the MPEG-1 audiovisual format. *A & M Records, Inc. v. Napster, Inc.*, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at \*2 n.1 (N.D. Cal. May 5, 2000) [hereinafter *Napster III*]. MP3 files reproduce nearly CD-quality sound in a compressed format. *Id.* at \*3. The technology essentially allows people to convert the information stored on a CD, which is quite large and unwieldy, into a format which can be quickly and efficiently uploaded and downloaded on the Internet. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1073–74 (9th Cir. 1999) (discussing MP3 technology).

Consumers can acquire MP3 files in two ways. *Napster I*, 114 F. Supp. 2d at 901. The first is to download recordings that have already been converted into the MP3 format. *Id.* The second is to utilize "ripping" software which copies an audio CD directly onto a computer hard drive and converts the CD's music into MP3 format. *Id.*

<sup>12</sup> In other words, at any given moment, exactly what songs are available is dependent upon who is logged in and what songs they have available on their *own* computer.

song title or artist, click on the "Find It" button, and view a list of files responsive to the search request. To download a file, the user simply highlights it and clicks the "Get Selected Songs" button.<sup>13</sup>

This process is what is meant by peer-to-peer ("PTP") file-sharing. When a user clicks on the name of a file to download it, the Napster server communicates with the requesting and host users' MusicShare browser software to facilitate a connection and initiate the file download.<sup>14</sup> In other words, Napster merely connects two computers. The requesting user downloads the file directly from the host user's computer—the file is not routed through the Napster server at all.<sup>15</sup>

From its humble beginnings, Napster had attracted more new customers in less time than any other online service in history.<sup>16</sup> At the height of its popularity in early February 2001, the service had 80 million registered users.<sup>17</sup> For comparison, Yahoo's visitor roster at the time averaged only 54 million per month.<sup>18</sup> By mid-year 2000, approximately 10,000 music files were shared per second using Napster, and 100 users attempted to connect to the system every second.<sup>19</sup> As of early 2001, approximately 1.6 million users were online at any one time.<sup>20</sup> It is estimated that 2 billion songs were downloaded using Napster in January 2001, up from 1.4 billion in September 2000, when the research firm Webnoize began its measurements.<sup>21</sup> Now, Napster is a for-profit corporation<sup>22</sup> that plans to cash in on its wide-spread popularity. Napster, Inc.'s market value, measured in part by the size of its user base, was between 60 and 80 million dollars in mid-year 2000.<sup>23</sup> Further, while it is extremely difficult to predict the future of Napster<sup>24</sup>—or even how long it will be in existence—the company was still alive in 2002 and had begun testing a new pay service.<sup>25</sup>

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<sup>13</sup> *Napster III*, 2000 U.S. Dist. LEXIS 6243, at \*3–\*4.

<sup>14</sup> *Id.*

<sup>15</sup> *Morning Edition: Three-Judge Panel Hears Arguments from Both Sides in the Napster Case* (NPR radio broadcast, Oct. 3, 2000).

<sup>16</sup> James Harding, *Music Labels Go Back to School*, FINANCIAL TIMES, Jan. 31, 2001, at 32.

<sup>17</sup> Jefferson Graham, *A Slimmed-Down Napster Gets Back Online; Trial Run is Heavy on Little-Known Artists*, USA TODAY, Jan. 10, 2002, at D1.

<sup>18</sup> Jefferson Graham, *Napster Moving Toward Monthly Fee: Song-Swapping Service Could Set the Tone for Internet Music Sales*, USA TODAY, Jan. 30, 2001, at A1.

<sup>19</sup> *Napster I*, 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000).

<sup>20</sup> *German Media Firm Says Napster Will Charge Fees*, ST. LOUIS POST-DISPATCH, Jan. 31, 2001, at C7.

<sup>21</sup> Graham, *supra* note 18, at A1.

<sup>22</sup> Levy, *supra* note 8, at 50 (noting that the original idea to form Napster into a business first came from Fanning's uncle).

<sup>23</sup> *Napster I*, 114 F. Supp. 2d at 902.

<sup>24</sup> Napster went off-line in July of 2001, and as of January 2002, the five major record labels were still suing Napster for copyright infringement. However, at this time, the new CEO

## II. STAKEHOLDERS AND SUMMARY OF THE NAPSTER DEBATE

One large contingent of people raising their voices against Napster<sup>26</sup> are the artists and record labels themselves. A long list of artists have spoken out against the service, including Don Henley, Garth Brooks, Art Alexakis of Everclear, Elton John, and Puff Daddy.<sup>27</sup> Metallica and Dr. Dre were the first recording artists to actually take legal action.<sup>28</sup> The concerns of recording artists involve the loss not only of royalty payments<sup>29</sup> but also of artistic control over their own music.<sup>30</sup> However, there has been a small group that have spoken up in support of Napster.<sup>31</sup> In addition, some artists have at least tried to utilize the new PTP file sharing technology in promotions, often with little support from their record labels.<sup>32</sup>

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of Napster, Konrad Hilbers, was still trying to both settle these cases and persuade the labels to license their music to the new Napster. Graham, *supra* note 17, at D1.

<sup>25</sup> Napster announced, on January 9, 2002, that it had begun testing a new pay version of its music-swapping service with 20,000 selected users. Company officials said they expected the new service to be fully operational by April 2002, and that the price for the service would be between five dollars and ten dollars. *Napster Inc.: Music-Swapping Service Is Testing New Pay Version*, WALL ST. J., Jan. 10, 2002, at B11.

<sup>26</sup> As stated previously, see *supra* notes 24–25 and accompanying text, the quickly evolving nature of Napster makes it an extremely difficult topic to keep abreast of. In the discussion that follows, therefore, any references to Napster are generally meant to apply to the older, free version as opposed to the new, pay service unless indicated. Further, much of the discussion which follows is also relevant to other file-sharing services—the so-called Napster substitutes, see *infra* Part IV.B,—and should be deemed to apply where relevant.

<sup>27</sup> Eliscu, *supra* note 1, at 29.

<sup>28</sup> In early April 2000, the rock group Metallica were the first recording artists to file suit against Napster for copyright infringement and racketeering, and they included as defendants three universities where the Napster program was popular with students and infringing activities occurred. *Weekend Edition Sunday: Napster: Software Company Being Sued by Several Artists and Record Companies for Copyright Infringement* (NPR radio broadcast, Apr. 23, 2000) [hereinafter *Metallica NPR Broadcast*]. Dr. Dre filed his lawsuit on April 25, 2000. Eliscu, *supra* note 1, at 29.

<sup>29</sup> “What [Napster is] doing is straight-up bullshit, and I’m going to fight it to the death,” says Dr. Dre. Eliscu, *supra* note 1, at 29 (internal quotation marks omitted). “Napster is taking food out of my kids’ mouths. I’ve always dreamed about making a living at something that I love to do. And they’re destroying my dream.” *Id.* (internal quotation marks omitted).

<sup>30</sup> Metallica drummer Lars Ulrich says the band has no problem with people recording and trading live performances so long as nobody makes any profit. *Metallica NPR Broadcast*, *supra* note 28. Their lawsuit was prompted because “[t]he bottom line is it’s our music and our masters [i.e., the final version of songs that appear on recorded albums], and we control those. We have the right to make the decisions about who we make them available to.” *Id.*

<sup>31</sup> Says Public Enemy’s Chuck D: “The only ones screaming about this are those who had dominance in the prior system.” Eliscu, *supra* note 1, at 29 (internal quotation marks omitted).

<sup>32</sup> In what would have been perhaps the most daring online music promotion ever, the group Offspring planned to release their entire album, *Conspiracy of One*, for free in MP3

Looking outside the music industry, a large and powerful coalition of stakeholders have also rallied behind the record companies' suit against Napster. These include the Motion Picture Association of America, publishers, media photographers, graphic artists, digital software people, the Music Producers Guild, and even the National Basketball Association and Major League Baseball.<sup>33</sup> All of these groups signed an anti-Napster brief, their interest being to ensure that copyright laws carry over from the physical world to the Internet.<sup>34</sup> Allied with these groups is the Business Software Alliance (BSA), a trade group representing such software manufactures as Microsoft and Adobe, which submitted its own brief to the Ninth Circuit Court of Appeals in the Napster litigation. BSA's concern is that the negative publicity being generated by Napster may overshadow the legitimate uses of PTP file-sharing technology, around which many BSA members are hoping to build business.<sup>35</sup>

By contrast, however, there also exist many groups aligned in favor of Napster. One group includes companies that make computer hardware, telecommunications equipment, and consumer electronics (in other words, those that stand to make money derivatively from the increased and continued popularity of PTP file-sharing).<sup>36</sup> These companies make the same argument as a group of law professors who filed a pro-Napster brief in the Ninth Circuit litigation: that copyright law should not be used to ban new technologies that have legitimate purposes.<sup>37</sup> Another pro-Napster ally is the conservative activist group the Eagle Forum. It fears that an injunction against Napster could set a precedent that would allow companies to control or prevent the dissemination of information about their products.<sup>38</sup>

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format several weeks before its release in record stores. Jenny Eliscu, *The Offspring Go Offline*, ROLLING STONE, Nov. 9, 2000, at 33. After Sony Music, parent company of the band's Columbia Records recording label, and the band threatened each other with lawsuits, Offspring agreed to release only a single, "Original Prankster," as a free MP3 file on more than 200 websites. *Id.* The Offspring's gambit would have been a direct challenge to the music industry's position that the availability of free MP3s will hurt record sales. Similarly "[i]n March 1999, Tom Petty removed a free download of his single 'Free Girl Now' from MP3.com after only two days when his label, Warner Brothers, expressed concerns." *Id.* at 34.

<sup>33</sup> *Morning Edition: Napster Case Draws Support from Both Sides of Copyright Issue* (NPR radio broadcast, Oct. 2, 2000) [hereinafter *Napster Draws Support*].

<sup>34</sup> *Id.* ("[All these groups will] suffer irreparable harm," says Jack Valenti, president of the Motion Picture Association of America, "if the court allows users of Napster-like systems to freely copy books, photographs and broadcasts of ball games.").

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* This is similar to the argument that the current Napster suit parallels the suit brought by the movie industry against Sony in the early 1980s over the introduction of Sony's Betamax VCR. See *infra* Part III.B.

<sup>38</sup> *Napster Draws Support*, *supra* note 33. Phyllis Schlafly, president of the Eagle Forum, gives the example of Novartis Pharmaceuticals, the company that owns the trademark, and

Another group reiterating the concerns expressed by the Eagle Forum is the Digital Media Association, or DiMA, a trade group representing Internet companies that provide audio and video content. While neither pro- nor anti-Napster, DiMA believes the decision by Judge Patel, granting the temporary injunction against Napster,<sup>39</sup> erroneously puts the burden on Napster to prevent its users from infringing copyright use. Jonathan Potter, President of DiMA perceives this decision as sweeping away the protection of the Digital Millennium Copyright Act (DMCA), a federal law designed to protect Internet service providers from liability.<sup>40</sup>

The legal position of the music industry boils down to the simple contention that Napster facilitates stealing. Bringing together people who exchange almost CD-quality music for free means lower sales for all artists, which translates into less revenue for record companies and threatens the livelihood of the artists themselves.<sup>41</sup> Napster counters this contention with the argument that it exposes listeners to new music, in a sense being akin to a new kind of radio that actually promotes music sales.<sup>42</sup> Further, Napster contends that its users are engaging in the noncommercial trading of music files for personal use.<sup>43</sup> Therefore, as the

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copyrights on much of the information about, the drug Ritalin. *Id.* Her concern is that the company, by virtue of their copyrights, could shut down all search engines that lead people to criticisms of Ritalin and alternate remedies. *Id.*

<sup>39</sup> See Napster I, 114 F. Supp. 2d 896, 927 (N.D. Cal. 2000).

<sup>40</sup> *Napster Draws Support*, *supra* note 33.

The provider of the service doesn't know everything the service is being used for. We know what the service is being marketed for, we know how we're advertising it, but we don't know how every consumer is using it, and we don't want to have a responsibility for policing our consumers.

*Id.* (internal quotation marks omitted); see also *infra* Part III.A (discussing the DMCA).

<sup>41</sup> Fred Goodman, *The Future is Now: How the Internet Is Reshaping the Record Industry*, ROLLING STONE, July 6–20, 2000, at 41.

<sup>42</sup> *Id.* Says John Perry Barlow—former lyricist for the Grateful Dead, co-founder and vice-chairman of the Electronic Frontier Foundation, and associate professor at Harvard Law School's Berkman Center for Internet and Society: "If people are selling songs that are my work and collecting the proceeds, I think that's theft. . . . If people are distributing my work, as they are on Napster, I don't regard that as theft, I regard it as advertising." *Id.* at 45 (internal quotation marks omitted). Adds Don Rose, the founder and president of Rykodisc:

Remember when the RIAA went after home taping in the Seventies? . . . They had a sticker . . . and a slogan [that read] HOME TAPING IS KILLING MUSIC. Well, it didn't. And remember how videotapes were going to kill film? Before that, records were going to kill live performances. In each case the opposite turned out to be true. You've got to take a historic perspective. Napster is a new technology, and it's freaking out the status quo.

*Id.* at 45 (internal quotation marks omitted).

<sup>43</sup> It is not seriously alleged that Napster users receive monetary compensation in exchange for making MP3 files available to others for downloading. *Napster I*, 114 F. Supp. 2d at 912.

individual users themselves are not engaging in copyright infringement, Napster argues it cannot be “secondarily liable for users’ nonactionable exchange of copyrighted musical recordings.”<sup>44</sup>

As might be said, though, the proof is in the pudding. Napster proponents cite several statistics, studies, and examples of its benign impact on record sales.<sup>45</sup> While this might be the case, the more compelling studies (and common sense) belie the fact that, in the end, access to free music will ultimately hurt record sales.<sup>46</sup> Whereas before consumers had the simple choice of buying or not buying music, now they have the option of not buying and still owning the music. Furthermore, the proliferation of portable MP3 players and CD burners allow people to take the music they downloaded at no cost and use it as freely as if they

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<sup>44</sup> Napster II, 239 F.3d 1004, 1024 (9th Cir. 2001).

<sup>45</sup> For example, three of the most popular artists in terms of trading on Napster—Eminem, ‘N Sync, and Britney Spears—sold record-setting numbers in 2000. Goodman, *supra* note 41, at 42. Record sales for the first quarter of 2000 were also up nearly 8% over the year before. Metallica NPR Broadcast, *supra* note 28. In addition, a study of college students who download music, conducted by the Internet research firm Webnoize, Inc., found that the majority of students do not permanently store the files they download. Eliscu, *supra* note 1, at 29. This sentiment is echoed by a *Rolling Stone* poll of some 5,000 readers, which states that only 8% believed that free music on the Internet decreased the number of CDs they purchased, while 36% felt it increased purchases. *RS Readers Poll: Music and the Internet*, ROLLING STONE, July 6–20, 2000, at 45 [hereinafter *Readers Poll*].

<sup>46</sup> Says one fourteen-year-old in Falls Church, Virginia: “I haven’t purchased a CD in quite some time.” Levy, *supra* note 8, at 46 (internal quotation marks omitted). Also, Forrester Research conducted a study that in the next five years the music industry will lose \$3.1 billion to Internet piracy and the increasing independence of musicians. Cohen, *supra* note 3, at 70.

Some of the most telling studies are those focusing on college students, Napster’s biggest users. *Napster I*, 114 F. Supp. 2d at 909. One such study, prepared by plaintiffs’ expert witness in the case against Napster, Dr. E. Deborah Jay, shows that 41% of college students surveyed “described [Napster’s] impact on their music purchases in a way which either explicitly indicated or suggested that Napster displaces CD sales.” *Id.* (internal quotation marks omitted). Jay’s overall conclusion was that the more music Napster users downloaded, the more likely they were to admit that such habits reduced their music purchases. *Id.* Another study, prepared by Soundscan, compared sales from retail stores near university campuses to nationwide averages. The conclusion is that “on-line file sharing has resulted in a loss of album sales within college markets.” *Id.* at 909–10 (internal quotation marks omitted). The data suggests that sales in these markets were off 2.5% during the same period that overall records sales were up. Goodman, *supra* note 41, at 42.

In addition, statistics released for the year 2000 present even more damning evidence. The International Federation of the Phonographic Industry reported that worldwide music sales fell for the first time since it began collecting data some ten years ago. Worldwide sales declined 1.3% to \$36.9 billion and unit sales dropped by 1.2% to 3.5 billion. Also, in the United States, the sale of CD singles, perhaps “the market most likely to be hit by the Internet,” fell by 39%. David Teather, *Once Bitten, Twice Shy: Napster Has Been Tamed, but the Wider Battle for Online Music Is Only Just Beginning*, THE GUARDIAN (London), May 14, 2001, at 62.



had purchased it legitimately.<sup>47</sup> What further bothers Napster critics is the impression among many, especially younger users, that downloading music from Napster is not morally wrong.<sup>48</sup> Many perceive Napster as fulfilling a sort of modern-day Robin Hood role: taking from the unscrupulous, rich recording companies and giving back to the general public after years of paying exorbitant prices for CDs.<sup>49</sup>

### III. LEGAL ANALYSIS OF NAPSTER

This Part analyzes the current law as it applies to the Napster litigation. As per the decisions of the Northern District of California<sup>50</sup> and Ninth Circuit<sup>51</sup> in granting and upholding a preliminary injunction against Napster, respectively, current law points to the finding that Napster engaged in copyright violation. The following discussion first examines the inapplicability of the DMCA, the fair-use doctrine, the substantial non-infringing use doctrine, and the *Sony* case as potential shields to liability. Finally, the likely reach of a Napster legal precedent will be examined.

#### A. Digital Millennium Copyright Act

The safe harbor provisions of the Digital Millennium Copyright Act (DMCA) are one possible argument for the legality of Napster.<sup>52</sup> Passed in 1998, the DMCA<sup>53</sup> addresses the liability of online service and Internet access providers for copyright infringements occurring online. Subsection 512(a) of the DMCA

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<sup>47</sup> The record industry's concern about the availability of portable MP3 players contributing to the appeal of MP3 file piracy led to the Recording Industry Association of America (RIAA) filing suit against Diamond Multimedia Systems, Inc., makers of the Rio, a portable MP3 player, in October 1998. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d 624, 625 (C.D. Cal. 1998). On appeal, the Ninth Circuit denied the RIAA's request for an injunction and, citing the *Sony* case, suggested that the Rio player constituted fair use. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) ("The Rio merely makes copies in order to render portable, or 'space shift,' those files that already reside on a user's hard drive.").

<sup>48</sup> "Basically they're saying our art is worthless, it's free for the taking," says Ron Stone, manager for such artists as Tracy Chapman and Bonnie Raitt. "Music used to be a collectible, now it's a disposable." Levy, *supra* note 8, at 52 (internal quotation marks omitted).

<sup>49</sup> The *Rolling Stone* poll indicates that only 25% of respondents felt it was wrong to download an artist's music for free. *Readers Poll*, *supra* note 45, at 45. A typical response from one Virginia teenager is that "[p]eople don't think it's anything bad. Or think about it at all." Levy, *supra* note 8, at 46 (internal quotation marks omitted).

<sup>50</sup> *Napster I*, 114 F. Supp. 2d at 927.

<sup>51</sup> *Napster II*, 239 F.3d 1004, 1029 (9th Cir. 2001).

<sup>52</sup> 17 U.S.C. § 512 (Supp. V 1999).

<sup>53</sup> Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

exempts qualifying "service providers"<sup>54</sup> from monetary liability for direct, vicarious, and contributory infringement and limits injunctive relief.<sup>55</sup> Subsection 512(a) limits liability "for infringement of copyright by reason of the [service] provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider" if five conditions are met.<sup>56</sup> Napster's claim, therefore, is that § 512(a) protects its core function of "transmitting, routing, and providing connections for sharing of the files its users choose."<sup>57</sup>

This argument falls down for several reasons. First, Napster does not transmit, route, or provide connections "*through a system or network controlled*" by the service provider as expressly required by § 512(a).<sup>58</sup> Legislative history indicates that § 512(a) was meant to apply only to activities "in which a service provider plays the role of a 'conduit' for the communications of others."<sup>59</sup> It is true that the Napster server enables or facilitates the connection between the host and requesting user by conveying the information necessary to establish such a connection. However, the connection itself occurs through the Internet. As

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<sup>54</sup> The DMCA defines "service provider" as:

As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

17 U.S.C. § 512(k)(1)(A).

<sup>55</sup> 17 U.S.C. § 512(a).

<sup>56</sup> *Id.* The five conditions outlined in § 512(a) are:

(1) the transmission of the material was initiated by the direction of someone other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

*Id.*

<sup>57</sup> Napster III, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at \*12 (N.D. Cal. May 5, 2000).

<sup>58</sup> 17 U.S.C. § 512(a) (emphasis added).

<sup>59</sup> H.R. REP. NO. 105-551(II), at 51 (1998).

previously discussed, Napster has no part in the exchange of files between users; this occurs directly between the host and requesting users *through* the Internet itself.<sup>60</sup> It cannot be maintained that Napster owns or controls the Internet itself.

What makes more sense is that § 512(a) was intended to protect an entirely different kind of service provider than that contemplated by Napster. Even assuming that browser software on each user's computer is part of the Napster system, transmission of files occurs *between* different parts of the system, not "through" the system.<sup>61</sup> This situation is more akin to an intranet system, like those developed by companies to share information among different branches or offices. The term "through" denotes protection for systems operated by such classic Internet service providers as AOL or CompuServe. These service providers, much more clearly, perform a gate-keeping or access-providing function. Here, the service providers truly are passive conduits whereby information is transmitted through their system, solely at the request of users and without any modification of content, to the end user's computer. It is the connection through these service providers to the Internet itself that makes the transmission of information possible.

The second argument against Napster is that, regardless of meeting the requirements of § 512(a), the relevant aspects of Napster should not be analyzed under that section. It is true that Napster partially entails automatically transmitting, routing, or providing connections for its users.<sup>62</sup> However, Napster primarily functions as an information-gathering tool.<sup>63</sup> Furthermore, these searching and indexing functions, economically speaking, are its core value. From a user's perspective, it is not the ability to transmit MP3 files, but the ability to quickly and conveniently find MP3 files one wants to download that makes Napster an appealing service.<sup>64</sup> In fact, Napster has advertised how users can easily locate "millions of songs" without "wading through page after page of unknown artists."<sup>65</sup> Therefore, if Napster were to enjoy any of the safe-harbor provisions, it would have to meet the more stringent eligibility requirements of § 512(d), which it does not.<sup>66</sup>

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<sup>60</sup> See *supra* notes 14–15 and accompanying text.

<sup>61</sup> *Napster III*, 2000 U.S. Dist. LEXIS 6243, at \*21–\*22.

<sup>62</sup> *Id.* at \*15.

<sup>63</sup> Edward Kessler, Napster's vice president of engineering, stated in his deposition that "Napster operates exactly like a search engine or information location tool to the user." *Id.* at \*16 (internal quotation marks omitted).

<sup>64</sup> As discussed previously, part of the impetus for Shawn Fanning's development of Napster was exactly this problem. See *supra* notes 8–9 and accompanying text.

<sup>65</sup> *Napster III*, 2000 U.S. Dist. LEXIS 6243, at \*18 (internal quotation marks omitted).

<sup>66</sup> Section 512(d) states it protects service providers from liability "for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using *information location tools*, including a directory, index, reference, pointer, or hypertext link. . . ." 17 U.S.C. § 512(d) (Supp. V 1999)

Finally, an argument which cuts against the application of any DMCA safe harbor provision is § 512(i). This subsection imposes additional copyright compliance requirements on eligibility for any DMCA safe harbor, namely notifying users that chronic infringing use may result in the termination of user privileges.<sup>67</sup>

What is abundantly clear is that Napster, besides not following this section,<sup>68</sup> had actual incentive to see the continuation of infringing copyright use. Section 512(i) requires that a service provider must have “reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers.”<sup>69</sup> Because Napster does not collect personal information from users, those who are kicked off the service can resubscribe.<sup>70</sup> In fact, a document authored by Sean Parker, co-creator of Napster, stresses the need for Napster to remain ignorant of users’ real names and IP addresses “since they are exchanging *pirated music*.”<sup>71</sup> Another option which Napster ignored was blocking the IP addresses of those already kicked off the service. While Napster claimed this is not a reasonable means of terminating use, the company actually utilized this very method in some situations.<sup>72</sup>

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(emphasis added). This protection, however, is contingent upon the fact that the service provider does not possess actual knowledge, or is unaware of facts that would make it apparent, that infringing activity is taking place. 17 U.S.C. § 512(d)(1)(A), (B). Subsection (C) requires the service provider to “expeditiously . . . remove, or disable access to, the material” upon obtaining knowledge of the infringing activity. 17 U.S.C. § 512(d)(1)(C). As the discussion accompanying *infra* notes 68–75 demonstrates, Napster officials not only had knowledge of infringing use but also were promoting and facilitating this infringing activity.

<sup>67</sup> 17 U.S.C. § 512(i)(1)(A). While legislative history indicates that Congress did not intend to require service providers to “investigate possible infringements, monitor its service or make difficult judgments as to whether conduct is or is not infringing,” the notice requirement is designed to insure that repeat offenders “know that there is a realistic threat of losing [their] access.” H.R. REP. NO. 105-551(II), at 61 (1998).

<sup>68</sup> Napster did not adopt a written copyright policy that was communicated to users until February 2000, two months after the filing of the initial suit by record companies against Napster. *Napster III*, 2000 U.S. Dist. LEXIS 6243, at \*26. Although § 512(i) does not specify when the copyright compliance policy must be in place, it is counter-intuitive to assume that Congress meant to allow otherwise guilty actors to diffuse liability by the post-hoc addition of such a policy.

<sup>69</sup> 17 U.S.C. § 512(i)(1)(A).

<sup>70</sup> As in the Metallica litigation, Napster subsequently blocked the access of users based on their user-name and password. However, as one University of Maryland sophomore says, “Anyone who wants to get back on right now can easily do it.” Eliscu, *supra* note 1, at 29 (internal quotation marks omitted).

<sup>71</sup> *Napster I*, 114 F. Supp. 2d 896, 918 (N.D. Cal. 2000) (citations omitted).

<sup>72</sup> Napster bans the IP addresses of users who run “bots,” programs that continuously perform actions in a robotic fashion, on the service. *Napster III*, 2000 U.S. Dist. LEXIS 6243, at \*29 & n.8.

Furthermore, other activities clearly reveal that, from a very early point, Napster executives possessed knowledge of, and were in fact encouraging, the infringing activity of its users. At one point, Napster executives downloaded infringing material to their own computers and took photographs of the screen listing infringing files as promotion for the site.<sup>73</sup> Also, an early version of the Napster website proudly proclaimed the ease with which users could find their favorite music without "wading through page after page of unknown artists."<sup>74</sup> Napster also recognized its own vested interest in the promotion and continuation of copyright infringement by its users. As Sean Parker stated in a litigation deposition: "[W]e are not just making *pirated* music available but also pushing demand."<sup>75</sup>

### *B. Fair-Use, Substantial Non-Infringing Use, and the Sony<sup>76</sup> Case*

Many in the pro-Napster camp parallel the current situation with the introduction of the VCR in the mid 1980s. While the *Sony* case, on its surface, may appear to lend support to the fair-use and substantial non-infringing use arguments, ultimately the cases are dissimilar, and these defenses should not be applicable to Napster.

The Supreme Court in *Sony* stated: "Any individual may reproduce a copyrighted work for a 'fair use'; the copyright owner does not possess the exclusive right to such a use."<sup>77</sup> Section 107 of the Copyright Act provides a non-exhaustive list of fair-use factors:<sup>78</sup>

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or the value of the copyrighted work.

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<sup>73</sup> *Napster I*, 114 F. Supp. 2d at 919.

<sup>74</sup> *Napster III*, 2000 U.S. Dist. LEXIS 6243, at \*18.

<sup>75</sup> *Napster I*, 114 F. Supp. 2d at 903 (internal quotation marks omitted); see also *infra* notes 123–24 and accompanying text.

<sup>76</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>77</sup> *Id.* at 433.

<sup>78</sup> 17 U.S.C. § 107 (1994).

Looking at the first factor, if the new work transforms the copyrighted material in any way, this can satisfy fair use.<sup>79</sup> However, converting sound recordings from the CD to the MP3 format does not transform or add any new value to the original copyrighted work.<sup>80</sup>

Another issue in the "purpose and character" of the use is whether the use is commercial or non-commercial.<sup>81</sup> This is a crucial point where Napster's argument is suspect. It is true that most, if not all, Napster users downloaded songs for their own enjoyment, not to sell for profit. It would appear this is no different, therefore, than the situation of where one friend makes a copy of a song on tape or a copy of a movie on HBO. This analogy, though, fails for several reasons. First, the nature of the interaction between users is different. The majority of music-swapping on Napster and similar services occurs not between friends or acquaintances, but among anonymous users.<sup>82</sup> Second, the technology of the Internet largely removes the barriers of geography, time and effort, and accessibility and allows for the copying of copyrighted material on a scale previously incomprehensible.<sup>83</sup> Third, courts have imputed commercial use, even in the absence of direct economic benefit, from the "repeated and exploitative" copying of "copyrighted works . . . to save the expense of purchasing authorized copies."<sup>84</sup>

Fourth, and most importantly, by being the facilitator in the transfer of files, Napster really does change the nature of the transaction to a commercial one. Napster is a for-profit corporation, and it has taken steps to monetize its popularity with users.<sup>85</sup> The business plan of Napster entails making money off of other individuals' copyrighted material, which certainly entails commercial

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<sup>79</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). Such is the fair-use defense of a satirist. One example would be when the comedy show *Saturday Night Live* uses a portion of a song in order to parody a musical artist.

<sup>80</sup> See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (stating such repackaging "adds no . . . 'new aesthetics, new insights and understandings' to the original") (citations omitted).

<sup>81</sup> If a use is non-commercial, the plaintiff bears the burden of showing a "meaningful likelihood" that it would adversely affect the potential market for the copyrighted material. *Sony*, 464 U.S. at 451. Likewise, although not conclusive, a commercial use weighs against a finding of fair use. *Campbell*, 510 U.S. at 585.

<sup>82</sup> *Napster I*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000).

<sup>83</sup> Previously, someone wishing a copy of a song had to find someone with that song, and, realistically, this person could not be in another city or state. As previously discussed, though, part of Napster's appeal is that it allows people to search for exactly the songs they want and provides an almost instantaneous connection to that source. See *supra* notes 11-13 and accompanying text.

<sup>84</sup> *Napster II*, 239 F.3d 1004, 1015 (9th Cir. 2001) (citing *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679, 687 (N.D. Cal. 1994) ("finding commercial use when individuals downloaded copies of video games 'to avoid having to buy video game cartridges'")).

<sup>85</sup> See *supra* notes 24-25 and accompanying text.

activity.<sup>86</sup> In many ways, Napster is very similar to the factual situation in *Fonovisa, Inc. v. Cherry Auction, Inc.*<sup>87</sup> In *Fonovisa*, the defendants operated a swap meet at which independent vendors sold counterfeit music recordings. Although Napster users offer their music for free, like in *Fonovisa*, it would be "difficult for the infringing activity to take place in the massive quantities alleged without the support services provided . . . ."<sup>88</sup> Also, Napster, like the defendants in *Fonovisa*, stand to make a profit from facilitating this infringing use.

In addition, Napster rates poorly in an analysis of the second, third, and fourth fair-use factors. With regards to the second factor, since the MP3 files being traded are creative in nature, they constitute entertainment, which cuts against a finding of fair use.<sup>89</sup> Under the third factor, transferring MP3 files over Napster constitutes copying the entirety of the copyrighted work. Also, analysis of the fourth factor shows Napster does not fall within fair use. Although the empirical data is not currently overwhelming, that which is most persuasive suggests that Napster use has had a negative effect on music purchasers.<sup>90</sup> Furthermore, Napster directly interferes with record companies' attempts to enter the digital downloading market.<sup>91</sup> When faced with a choice of going to Napster and downloading songs for free or having to pay for almost exactly the same product, most will choose to get something for nothing.<sup>92</sup>

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<sup>86</sup> See *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (holding that unauthorized copying of scholarly articles by for-profit enterprise constituted commercial use as the enterprise reaped indirect economic advantage from copying).

<sup>87</sup> 76 F.3d 259, 264 (9th Cir. 1996).

<sup>88</sup> *Id.* The support services provided by Napster include browser software, searching and indexing functions, and a means of connecting users. *Napster I*, 114 F. Supp. 2d 896, 920 (N.D. Cal. 2000).

<sup>89</sup> Works that are creative in nature or considered entertainment are "closer to the core of intended copyright protection . . ." *Campbell*, 510 U.S. at 586; see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1558 (M.D. Fla. 1993) (citing *New Era Publ'ns Int'l v. Carol Publ'g Group*, 904 F.2d 152, 157-58 (2d Cir. 1990)).

<sup>90</sup> See *supra* note 46. Furthermore, courts reject the suggestion that a positive impact on sales negates the copyright holder's entitlement to access derivative markets. See *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 81 n.16 (2d Cir. 1997) (noting that plaintiff retained right to a licensing fee, even if infringing use of plaintiff's poster in television program allegedly increased poster sales); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (holding that allegedly positive impact on plaintiff's prior market "in no way frees defendant to usurp a further market that directly derives from reproduction of . . . copyrighted works").

<sup>91</sup> See Fred Goodman, *Online but Not on Time*, ROLLING STONE, Sept. 14, 2000, at 45, 50 (discussing the efforts of record labels to provide a Napster-type service and the problems they are facing).

<sup>92</sup> As a point of illustration, during the course of the Napster litigation, all forty-nine songs available for purchase on Sony's website were available free of charge on Napster. *Napster I*, 114 F. Supp. 2d at 915; see also *supra* notes 48-49 and accompanying text (discussing the

Another possible legal defense for Napster is the staple article of commerce doctrine, or substantial non-infringing use. The Supreme Court in *Sony* stated that the defendant was not liable for selling VCRs because these items were "capable of commercially significant non-infringing uses."<sup>93</sup> The non-infringing use identified in *Sony* was that of time-shifting, the ability of people to record a television program in order to view it at a later time.<sup>94</sup> Napster appealed to the fact that it also provides several non-infringing services, including chat rooms, a "New Artist Program" (which profiles and allows the downloading of music of unsigned artists), sampling (the ability of Napster users to listen to a song before they purchase it), and "space-shifting" (the ability of a user to convert a CD he or she already owns into MP3 format and use Napster to transfer music to a different computer).<sup>95</sup>

However, the Napster situation is dis-analogous from *Sony* for several reasons. First, the Court in *Sony* determined that time-shifting represented the principal use of "VTRs."<sup>96</sup> Furthermore, time-shifting was found not to have an adverse impact on the television market. This is because, in the case of time-shifting, people were recording television programs, which they were legally entitled to watch in the first place.<sup>97</sup> The primary use of Napster, however, is to download copyrighted music.<sup>98</sup> This is born out not only by common sense but

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attitude of many Napster users, who possess a sense of entitlement to free downloaded songs and see nothing morally wrong with the practice).

<sup>93</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

<sup>94</sup> *Id.* at 423.

<sup>95</sup> *Napster I*, 114 F. Supp. 2d at 904, 907-08.

<sup>96</sup> *Sony*, 464 U.S. at 421.

<sup>97</sup> *Id.* at 454-55.

<sup>98</sup> A sampling of files available on Napster showed that 87% were copyrighted. *Napster I*, 114 F. Supp. 2d at 902-03. The New Artist Program is also seriously suspect. A sampling of 1,150 music files showed that only eleven were those of new artists. *Id.* at 904. Furthermore, the New Artists program only began after the onslaught of litigation:

The evidence shows that, in fact, promoting [new artists] was not the chief strategy in Napster's business plan. Rather, defendant promoted the availability of songs by major stars. . . . Suddenly they found those unknown artists and would seek to use them as a basis for protection against infringement of the well-known artist whose music they were making available or providing access to.

*A & M Records, Inc. v. Napster, Inc.*, 2000 WL 1009483 at \*4 (N.D. Cal. July 26, 2000) (transcript of proceedings).

Napster's space-shifting argument has some support. *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999) (finding the space-shifting function of [the portable MP3 player] Rio "paradigmatic noncommercial use"). However, the Ninth Circuit found *Diamond* dissimilar because, in that case, the method of shifting did not also simultaneously involve making the copyrighted material available to the countless other individuals. *Napster II*, 239 F.3d 1004, 1019 (9th Cir. 2001) (citing *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (finding space-



also by Napster's own internal documents and marketing strategy.<sup>99</sup> "Indeed, the most credible explanation for the exponential growth of traffic to the [Napster] website is the vast array of free MP3 files offered by other users . . . ."<sup>100</sup>

### C. The Limited Legal Precedent of Napster

Part II examined the interests of various factions who have a stake in the legal fate of Napster.<sup>101</sup> Two of the main concerns espoused by these outlying stakeholders are: (1) that the fall-out surrounding Napster may threaten other, legitimate uses of PTP file-sharing technology;<sup>102</sup> and (2) that the Napster case may create a dangerous precedent, thereby placing an undue burden on Internet service providers<sup>103</sup> and allowing companies to prevent the dissemination of potentially critical information about their products over the Internet.<sup>104</sup>

While a considerable amount of commentary is quick to discuss the revolutionary ramifications of the Napster legislation, this appears to be one area where Napster will have a limited impact. First, the legal fate of Napster will not seriously undermine legitimate uses of PTP file-sharing or the Internet in general. While evading copyright laws is one obvious use of peer-to-peer processing, there are many other legitimate uses, and it does not appear that PTP technology will

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shifting of MP3 through a file-sharing service not fair use "even when previous ownership is demonstrated before a download is allowed").

In addition, the district court rejected Napster's sampling argument. Here, the court relied primarily on the same factors it used in determining that Napster constitutes commercial use: the ability to enjoy the benefit of a song file without paying for it and the ability to distribute songs to countless number of users. *Napster I*, 114 F. Supp. 2d at 913. By contrast, the Supreme Court in *Sony* stated "time-shifting merely enables a viewer to see . . . a work which he had been invited to witness in its entirety free of charge . . . ." *Sony*, 464 U.S. at 449. In addition, Napster users are able to keep a permanent copy of the songs they download, unlike other free promotion downloads currently provided by record companies—which consist of thirty- to sixty-second samples or full songs that are programmed to time out, or erase themselves, from the user's computer. *Napster I*, 114 F. Supp. 2d at 913–14. Finally, as previously discussed, even if sampling did manage to positively impact records sales, Napster would still interfere with the right of record companies to license their copyrighted material and enter the market for downloadable music. See *supra* notes 84–86 and accompanying text.

<sup>99</sup> See *supra* notes 68–75 and accompanying text.

<sup>100</sup> *Napster I*, 114 F. Supp. 2d at 916.

<sup>101</sup> See *supra* Part II.

<sup>102</sup> See *supra* notes 36–37 and accompanying text.

<sup>103</sup> See *supra* notes 39–40 and accompanying text (discussing the concerns raised by the DiMA).

<sup>104</sup> See *supra* note 38 and accompanying text (discussing the concerns and hypothetical examples of the Eagle Forum).

disappear if Napster goes the way of the dodo.<sup>105</sup> Another indicator that a potential demise of Napster will not sound the death knell for manufacturers of consumer electronics is the Ninth Circuit's decision, in *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.*,<sup>106</sup> finding that production of the Rio, a portable MP3 player, constituted substantial non-infringing use.<sup>107</sup>

Further, the Napster litigation will not result in a crippling precedent that either puts an onerous burden on companies or inhibits the free flow of ideas. The DMCA and the fair-use doctrine still exist to protect many on-line activities. Part II.A. goes to great lengths to demonstrate how Napster was unique in its affirmative strategy of trying to build a business based *solely upon other people's copyrighted works*.<sup>108</sup> People going on-line to criticize the drug Ritalin are not in jeopardy of being charged with copyright violations.<sup>109</sup> Similarly, services such as Yahoo! or Google are not threatened because, unlike Napster, their financial livelihood is not dependent upon the continuation and promotion of copyright infringement.<sup>110</sup>

Perhaps the most legitimate claim of these doomsayers is that the initial injunction granted by the district court against Napster was much too broad. In granting the injunction, "the district court . . . concluded that the law does not require knowledge of 'specific acts of infringement' and rejected Napster's contention that because the company cannot distinguish infringing from noninfringing files, it does not 'know' of the direct infringement."<sup>111</sup> In other words, because of the large amount of infringing activity occurring on Napster,<sup>112</sup>

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<sup>105</sup> At its most basic, PTP computing allows multiple PCs to harness their joint processing power for a common purpose. One current use of sharing processing power is assisting in the SETI, or Search for Extraterrestrial Intelligence Project. Here, people download the software, along with data, onto their home computer, and their PCs help in the processing of information that is being used to discover signs of intelligent life in the universe. *Morning Edition: Columnist Dan Gillmor of the San Jose Mercury News Discusses the Increase in Peer Computing, Where Individual Computers Work Together to Help Process Information* (NPR radio broadcast, Sept. 27, 2000) (examining the myriad, legitimate uses for PTP computing not threatened by the Napster litigation).

<sup>106</sup> 180 F.3d 1072 (9th Cir. 1999).

<sup>107</sup> *Id.* at 1079 ("The Rio merely makes copies in order to render portable, or 'space shift,' those files that already reside on a user's hard drive.").

<sup>108</sup> See *supra* notes 68–75 (discussing how Napster officials not only possessed positive knowledge that its users were exchanging pirated music but were also encouraging such activity).

<sup>109</sup> 17 U.S.C. § 107 (1994) (allowing the fair-use defense for "purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research").

<sup>110</sup> See H.R. REP. NO. 105-551(II), at 58 (1998) (citing Yahoo! as an example of an information location tool covered by 17 U.S.C. § 512(d)).

<sup>111</sup> Napster II, 239 F.3d 1004, 1020 (9th Cir. 2001) (quoting and citing Napster I, 114 F. Supp. 2d 896, 917 (N.D. Cal. 2000)).

<sup>112</sup> See *supra* note 98.

the district court imputed knowledge of *all* infringing activity, placing the burden on Napster to monitor its users in order to avoid liability. The Ninth Circuit, however, rejected this position: "We are bound to follow *Sony*, and will not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs' copyrights."<sup>113</sup> In remanding the case,<sup>114</sup> the Ninth Circuit gave instructions for the district court to limit the scope of its injunction to instances where Napster possessed specific information relating to infringing activity.<sup>115</sup>

#### IV. PROBLEMS STILL ON THE HORIZON

Part III analyzed the current legal landscape surrounding the Napster litigation. However, this is only the beginning of the story. Part IV explores my central thesis that, regardless of its legal fate, the cultural and philosophical forces unleashed by Napster, combined with the technology of the Internet, are poised to transform the music industry.<sup>116</sup> In many respects, Napster is a verifiable social phenomenon. Says Pamela Samuelson, co-director of the Berkeley Center for Law and Technology, "Despite all their scary characteristics, people love this stuff."<sup>117</sup> This sentiment is also being echoed by those inside the music industry: "[To a certain extent, Napster] has been great for music. When was the last time

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<sup>113</sup> *Napster II*, 239 F.3d at 1020-21 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 436 (1984)).

<sup>114</sup> *Id.* at 1029.

<sup>115</sup> The court stated in its opinion:

[A]bsent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to the infringing use.

*Id.* at 1021 (citing *Sony*, 464 U.S. at 436).

<sup>116</sup> While most media attention has focused on Napster and the music industry, many other content-based industries face a similar threat. Many of the barriers to large-scale internet trading of such items as movies or books is due largely to technology limitations, barriers which very soon may disappear. Cohen, *supra* note 3, at 68. For example, movies contain too much data and simply take a long time to download currently. Books encounter the problem of being much too cumbersome to read off of a computer screen. However, pirated content appears to be a growing trend. A recent study cited by the Motion Picture Association of America estimates that 275,000 pirated movies are downloaded a day on the Internet, and this number is expected to increase to one million by 2002. Jefferson Graham, *Next Napsters Wait in the Wings*, USA TODAY, Feb. 8, 2001, at 3D.

<sup>117</sup> Levy, *supra* note 8, at 45; see also Goodman, *supra* note 91, at 45 ("The consumers are telling us they want good service and easy access," says Jimmy Iovine, co-chairman of Interscope Records.) (internal quotation marks omitted).

people were talking this much about music? There aren't going to be any winners until record companies reorient themselves to digital media."<sup>118</sup>

With this context in mind, section A details three distinct philosophies underlying and propelling Napster's incredible popularity. Section B investigates the various obstacles to enforcement in light of the availability of other Napster-like services. Section C examines a potential market solution to these dilemmas and its likely inefficacy. Finally, section D predicts that, in light of these problems, the foreseeable future will witness increased legal action and alternative proactive measures as artists and record companies scramble to protect the commercial value of their copyrights.

### A. Three Different Philosophies

The theme coming from the Napster camp is that Napster is not about stealing music, it is about a love of music. "What we want is to give new artists a chance to be heard," says Fanning. "It's a celebration of artists."<sup>119</sup> Talking about his desire to meet Dave Matthews, front-man of the Dave Matthews Band, he adds, "If I could just talk to Dave, one on one, as music lovers, . . . I know he'd understand what we're all about."<sup>120</sup>

And this sentiment is true, to a certain extent. What is more correct is to say that Napster is about the death, or at least the transformation, of record companies and the music industry as it exists today. The real question is what people hope to gain, or lose, from any sort of change in the status quo.

In part, one aspect of the Napster debate really is about the music. The complaint of many is that record companies and the drive for profits is killing popular music as a true artistic and creative enterprise. The argument is not a new one: radio and other outlets such as MTV have little interest in giving exposure to artists outside the mainstream.<sup>121</sup> Record companies push the music they think they can market the easiest and to the most people.<sup>122</sup> This leads to music based

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<sup>118</sup> Goodman, *supra* note 91, at 45 (reflecting the comments of Steve Gottlieb, president of TVT Records) (internal quotation marks omitted).

<sup>119</sup> Sheffield, *supra* note 8, at 45.

<sup>120</sup> *Id.*

<sup>121</sup> Says Geoff Mayfield, director of charts for *Billboard* magazine, "For the last decade, radio has embraced songs rather than artists . . . There just aren't any guarantees." Fred Goodman, *Sales Up, Biz Flat in 2000*, ROLLING STONE, Feb. 15, 2001, at 21, 22 (internal quotation marks omitted).

<sup>122</sup> Mayfield also cites several statistics that show record companies are increasingly relying on blockbuster albums rather than overall market expansion. First, the year 2000 saw the highest sales numbers for number one albums (albums that reach the top position on the *Billboard* charts) since 1991. *Id.* Second, there were fewer artists selling 100,000 copies this year than last. Thus, while album sales were up 4% from 1999, sales were unusually concentrated in select titles as fewer artists found a significant following for their music. As

upon the lowest common denominator. If people look to the 1930s and 1940s and the era of jazz as a high-water mark in American culture where the popular music of the day was also an extremely vital, artistic movement, then the current era is a cesspool of pre-packaged music meant to appeal mostly to twelve- to eighteen-year-olds. Control of the market place, therefore, is driven not by true music aficionados, but by corporate entities.<sup>123</sup>

Napster and the Internet break wide apart this current paradigm. By giving people easy access to a wide range of artists and music styles, the Internet has the ability to loosen the stranglehold that marketing executives have on mainstream American music.<sup>124</sup> The thrust of this contingent is not necessarily that music should be free,<sup>125</sup> but that the manner in which music is produced, marketed, and distributed in our society needs to change. As such, Napster is a positive force in that it appears to be shaking up the music industry.

On another level, Napster is not about the music at all, it is about making a profit. Whatever may have been the idealistic goals of Fanning when he first created Napster, it is now big business. Napster is very much a part of the dot-com economy. In May 2000, even after the onslaught of legislation, the venture-capital firm Hummer Winbold purchased a 20% ownership interest in the company for \$13 million, and other investors simultaneously invested \$1.5 million.<sup>126</sup> Furthermore, early Napster documents show that its ultimate goal was

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such, a troubling trend may be emerging whereby labels are "taking fewer chances on artists who don't make an immediate commercial impact." *Id.*

<sup>123</sup> In an interview with *Rolling Stone* magazine, pop-star Shaggy, whose album, *Hotshot*, spent four weeks on the *Billboard* pop charts in early 2001, discusses how he was released from his previous record label, Virgin, and his impression that record labels treat musicians like commodities: "[I]t's like chewing gum: You chew it, and when the juices run out, you spit it out." Mim Udovitch, *Q&A: Shaggy*, *ROLLING STONE*, Feb. 15, 2001, at 31. In addition, Shaggy responds to the question of whether the mentality of popular music has changed in the 1990s, resulting in record labels not being interested in the long-term careers of their artists:

Absolutely, because [the record companies are] so corporate these days. It's not like back in the day with Bob Marley, where you had Chris Blackwell, who owned his own company, Island, and believed the hell in his artists, even if it took them seven albums. Nowadays, if you ain't hitting on the first [album you release], God help you.

*Id.*

<sup>124</sup> "Here's my mission," says John Perry Barlow, former lyricist for the Grateful Dead, co-founder and vice-chairman of the Electronic Frontier Foundation, and associate professor at Harvard Law School's Berkman Center for Internet and Society, "I want to destroy the music industry so we can create the musician-and-audience industry." Goodman, *supra* note 41, at 45 (internal quotation marks omitted).

<sup>125</sup> "Let me be fair," says Barlow. "I think musicians and creative people have some concerns here that we need to evolve the right economy to address. But taking laws that were created for an entirely different economy and environment, and shoehorning cyberspace into them is doomed." *Id.* (internal quotation marks omitted).

<sup>126</sup> Napster I, 114 F. Supp. 2d 896, 902 (N.D. Cal. 2001).

to "bypass the record industry entirely" and "bring about the death of the CD."<sup>127</sup> Call it blackmail or call it shrewd business practice, what is clear is that Napster used the allure of free music to create such a large consumer base and demand in the hopes of forcing record companies into negotiating a settlement.<sup>128</sup>

A third philosophical strain underlying Napster and its progeny is even more ominous sounding to record companies. Napster represents an anarchist bent, the idea that music should be free. As the Nullsoft homepage, another Napster-like service, boasts, "We're legitimate, nihilistic media terrorists, as history no doubt will canonize us."<sup>129</sup> To a certain extent, the current Napster movement parallels the rise of the so-called counter-culture of the late 1960s, of which the Haight-Ashbury district of San Francisco was a prime example.<sup>130</sup> During this time, bands like the Grateful Dead, Jefferson Airplane, and the Byrds made a ritual out of free concerts in Golden Gate Park.<sup>131</sup> The Grateful Dead continued this tradition throughout their long touring career, allowing fans to tape their concerts for free and trade them amongst fellow Dead-heads. The most recent example of this phenomenon is the musical group Phish, which enjoyed (until their recent disbandment) a following of very devoted fans that circulate tapes of live shows and often travel throughout the country with the band, attending multiple concerts in different cities.<sup>132</sup> Although put somewhat glibly, many in this camp believe

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<sup>127</sup> *Napster I*, 114 F. Supp. 2d at 903 (Other documents state that "ultimately, Napster could evolve into a full-fledged music distribution platform, usurping the record industry as we know it today and allowing us to digitally promote and distribute emerging artists at a fraction of the cost") (internal quotation marks omitted, quoting the deposition of Sean Parker, Napster's co-founder).

<sup>128</sup> Says Steven Fabrizio, a lawyer for the Recording Industry Association of America: "I think that's clearly what Napster intends. . . . I think this is a very conscious business decision to take first and ask later." John Gibeaut, *Facing the Music*, ABA JOURNAL, Oct. 2000, at 37, 41, 104 (internal quotation marks omitted). This suspicion is confirmed by internal Napster documents which note "we should focus on our realistic short-term goals while wooing the industry before we try to undermine it." *Napster I*, 114 F. Supp. 2d at 903 (internal quotation marks omitted, quoting the deposition of Sean Parker, Napster's co-founder).

<sup>129</sup> Gibeaut, *supra* note 128, at 37.

<sup>130</sup> To a large extent, the Haight-Ashbury scene, as it was known, was very much a conscious attempt by its members to transcend what they saw as the traditional, and stifling, materialistic paradigm imposed by Western society. Although arguably naïve when viewed through the lens of history, those involved in this social movement embraced an alternative moral philosophy that conceptualized individuals interacting in a more communal manner and rejected many traditional forms of property ownership. See generally TOM WOLFE, *THE ELECTRIC KOOL-AID ACID TEST* (1999) (documenting and discussing the rise and fall of the Haight-Ashbury scene through the exploits of writer Ken Kesey and the Merry Pranksters).

<sup>131</sup> Gibeaut, *supra* note 128, at 41.

<sup>132</sup> See Jenny Eliscu, *Gone Phishing*, ROLLING STONE, Nov. 23, 2000, at 35, 42 (discussing how, in its seventeen years together, Phish "has established itself as an apt heir to the Grateful Dead's legacy" and noting how many "Phish-heads" "travel around the country attending shows").

that music itself should be a communal, not necessarily commercial, experience: "'The Man' is terrified of [Napster], more terrified than he ever was of the Sex Pistols or the Woodstock Nation. Suddenly revolution is back in fashion. Napster makes cyber hippies of us all."<sup>133</sup>

Most of these people are skeptical of the record industry's lamentations that Napster will spell the end of music. The concept is that good music will never go away. True artists will always be driven to create music, and people will continue to seek out music they enjoy and remunerate artists they respect. What will end is the current paradigm of exploiting consumers, a contention which is at least supportable in light of a recent Federal Trade Commission ruling ordering the five major record labels to cease a policy of price-fixing, in place since the early 1990s.<sup>134</sup> "[The record companies] just need to get over themselves. They were charging us too much for CDs in the first place, and I think artists and record companies need to figure out another way to market their music to us. Most music, especially if you're getting it off the computer, should be free."<sup>135</sup> This sentiment simply rejects the notion that what occurs on Napster is stealing.

### B. Barriers to Enforcement

In many respects, Napster has been an easy legal target: it is an organized corporate entity that has assets and a centralized nerve center to go after. While Napster's unique business plan may prove to be its undoing,<sup>136</sup> there exist alternative file-sharing services on the Internet that threaten content industries in a way Napster does not. Right now, many Napster clones exist that do not need a central clearinghouse the way Napster does—"in other words, programs that do what Napster does without a central authority to be held legally accountable."<sup>137</sup>

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<sup>133</sup> Stuart Maconie, *MP3 for the Devil*, TIMES (London), Jan. 26, 2001, § 2, at 8. Maconie further states:

[The record industry], you see, think Napster is the devil's spawn—as well they would. Free music is anathema to record companies; ideally they'd like you to pay several times over for the same music, i.e., a new copy of [the rock-group Pink Floyd's] *Dark Side of the Moon* every time they invent a new format. A global family of music enthusiasts happily sharing music is the kind of utopian hippy fantasy that gnaws at their innards.

*Id.* at 9.

<sup>134</sup> Andrew Dansby, *Government CD-Price War*, ROLLING STONE, June 22, 2000, at 29. The FTC decision, announced on May 10, 2000, estimated that music fans had been overcharged nearly 500 million dollars in the preceding three years alone. *Id.* Furthermore, the average CD price increased from \$13.98 in 1995 to \$16.98 in 2000. *Id.*

<sup>135</sup> Lyle V. Harris, *Napster Fees May Bring Backlash Users Say*, ATLANTA J. & CONST., Jan. 31, 2001, at C2.

<sup>136</sup> See *supra* notes 73–75 and accompanying text.

<sup>137</sup> *Napster, Software Company Being Sued by Several Artists and Record Companies for Copyright Infringement* (NPR radio broadcast, Apr. 23, 2000). Furthermore, Napster keeps lists

Just hours after the initial injunction against Napster was granted in July 2000, these services saw a sharp increase in use.<sup>138</sup>

Two such PTP services are Gnutella and Freenet. Gnutella<sup>139</sup> allows for the transfer of much more than MP3 music files—books, videos, software, essentially any type of downloadable file—in a manner that contains no central server, so it cannot be shut down.<sup>140</sup> Furthermore, several technical advancements have made Gnutella more user-friendly.<sup>141</sup> Freenet is perhaps even more radical. The program not only is decentralized, but also encrypts files and passes them anonymously from user to user, making file transfers untraceable.<sup>142</sup> Freenet also has a much more political bent than Napster. While Napster is primarily concerned with monetizing its popularity, Freenet creator Ian Clarke's dream is to liberate, and perhaps destroy, intellectual property.<sup>143</sup> The system proclaims, "Freenet is near-perfect anarchy."<sup>144</sup>

A third service becoming increasingly popular is Fast Track, used by services such as Kazaa, Grokster, and MusicCity's Morpheus. The Fast Track software allows users to search hard drives online for not only music but also movies and software.<sup>145</sup> What might be even more discouraging to record companies is that Fast Track appears to be rivaling the popularity of Napster at its peak. Nearly 34 million copies of the software has been downloaded as of October 2001, and 1.5 billion songs were downloaded by users of the three services in September

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of transfers, which provides potential litigants with a list of infringers. Levy, *supra* note 8, at 52–53.

<sup>138</sup> Jenny Eliscu, *Napster Court Battle Heats Up*, ROLLING STONE, Nov. 9, 2000, at 34.

<sup>139</sup> The Gnutella program was written by Justin Frankel—a programmer at Nullsoft, which is owned by America Online. Within hours of posting Gnutella to the Nullsoft site, AOL executives had it withdrawn, but the damage had been done. In that amount of time, the code had circulated through the Internet, and now hundreds of programmers support an active Gnutella community. Levy, *supra* note 8, at 53.

<sup>140</sup> David Thigpen, *Digital Swap Meets*, ROLLING STONE, Sept. 14, 2000, at 50.

<sup>141</sup> Until recently, Gnutella users had to possess much more knowledge than the average web-surfer, such as the ability to search computers by IP address. However, Gnutella is an "open-source" application, which means people are free to modify the basic technology. Two new applications, Limewire and Bearshare, have been developed that replicate Napster's easy search method. Within the first two months of its availability, over 200,000 users had downloaded Bearshare, and an average of 5,000 to 10,000 people were online at any one time. In a similar four-month period, approximately 100,000 users had downloaded Limewire. Graham, *supra* note 116.

<sup>142</sup> Thigpen, *supra* note 140, at 50.

<sup>143</sup> "My opinion is that people who rely on copyright probably need to change their business model." Levy, *supra* note 8, at 53 (internal quotation marks omitted).

<sup>144</sup> Gibeaut, *supra* note 128, at 41 (internal quotation marks omitted).

<sup>145</sup> Jefferson Graham, *Napster Proteges Under Fire From Entertainment Industry*, USA TODAY, Oct. 4, 2001, at D3.



2001.<sup>146</sup> While the Recording Industry Association of America and the Motion Picture Association of America have stated they have filed joint copyright infringement suits against the companies, many challenges exist. First, MusicCity, based in Nashville, is the only defendant based in the United States; Fast Track and Kazaa are based in Amsterdam and Grokster in the West Indies.<sup>147</sup> Second, this latest round of lawsuits is unlikely to stop others from developing new and similar file sharing programs.<sup>148</sup> Third, unlike Napster (but like Freenet and Gnutella), no central directory exists; users with powerful computers and high-speed Internet connections serve as distributors or "supernodes."<sup>149</sup>

Another possibility for enforcement is to go after the infringing users themselves. Although there exists at least one instance of this occurring,<sup>150</sup> record companies have been very hesitant to pursue this course of action, a point which was raised by Judge Beezer in oral arguments before the Ninth Circuit.<sup>151</sup> Record companies, though, face several possible risks if they choose to pursue this avenue of enforcement. First, going after relatively innocent users has the potential threat of creating a tremendous backlash against the music industry, reinforcing the "Robin Hood" mentality which has already been attached to the digital transfer of music.<sup>152</sup> Second, it is uncertain if this sort of activity would

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<sup>146</sup> *Id.* Says Ric Dube, Webnoize analyst: "This is where Napster was a year ago. What's more impressive is how fast they are growing. We saw a 55% jump in downloads from August to September." *Id.*

<sup>147</sup> *Id.* "The more international [the legal situation] gets, the more beholden [copyright holders] are to international laws, which makes it more challenging," says Jupiter Media Metrix analyst Mark Mooradian. *Id.*

<sup>148</sup> Graham, *supra* note 145, at D3. "There are always going to be young programmers looking to create something," says Dube. "Working up a music program is always going to be cool. This might scare off someone from thinking they could build a business on this, but not in the new peer-to-peer programs that get passed around." *Id.*

<sup>149</sup> Jefferson Graham, *As Napster Shuts, Others Carry the Tune*, USA TODAY, July 12, 2001, at D3.

<sup>150</sup> Nineteen-year-old Scott Wickberg, a freshman at the Oklahoma State University, had his computer seized by campus police on September 5, 2000. Jenny Eliscu, *Freshman Busted for MP3 Piracy*, ROLLING STONE, Nov. 9, 2000, at 33, 33-34. Campus police were tipped-off by the Recording Industry Association of America's (RIAA) Anti-Piracy Division, which patrols the Internet in search of individuals believed to be illegally trading copyrighted music. *Id.* Wickberg had been operating a file-sharing site, (FTP), from his dorm room computer. A password allowed others to log on and download anything from his catalogue of 10,200 MP3s (the size of which is most likely the reason why Wickberg was singled out). *Id.* Wickberg could be charged with contributory copyright infringement, a felony that carries a penalty of up to five years in prison and a \$250,000 fine. *Id.*

<sup>151</sup> *Morning Edition: Three-Judge Panel Hears Arguments from Both Sides in the Napster Case* (NPR radio broadcast, Oct. 3, 2000).

<sup>152</sup> See *supra* notes 48-49 and accompanying text.

have any sort of deterrent effect upon the activity of MP3 traders.<sup>153</sup> This is a crucial point, and one that will likely be tested by the music industry in the near future.<sup>154</sup> The problem, however, is that if the majority of current MP3 traders are not deterred from engaging in this practice, either by the threat of civil liability or criminal sanctions, the music industry faces a huge dilemma. While theoretically possible, it is not economically feasible to sue fifty million<sup>155</sup> individuals for copyright infringement.<sup>156</sup>

### C. Potential Market Solutions

Most likely, the presence of the Internet will not spell the end of the record companies or commercial digital downloading. Says one record executive, "We'll be fine. There will always be new music, and it's our job to figure out what people want to hear."<sup>157</sup> Also, questionable services such as Napster have problems that can be solved by official sites with quality control measures: files mis-labeled, "cuckoo eggs" (files that, once downloaded, do not contain the as advertised song but "gotcha" messages from anti-Napster activists), and computer viruses.<sup>158</sup> In addition, efforts are on the way to develop new technological standards that will help make digital music more secure.<sup>159</sup>

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<sup>153</sup> See generally *supra* note 92. Jason Thompson, a friend of Scott Wickberg, who was present when campus police arrived at Wickberg's dorm room door, says: "Scott and I told people what happened . . . and we told them to shut everything down, and they were like, 'Eh, whatever. Go away.' Around here, it's not really affecting how much trading of MP3s happens." Eliscu, *supra* note 150, at 34 (internal quotation marks omitted).

<sup>154</sup> See *infra* Part IV.D.

<sup>155</sup> Harding, *supra* note 16, at 32 (estimating the number of registered Napster users at fifty-seven million in February 2001).

<sup>156</sup> Even assuming that every user's infringing activity results in \$1,000 worth of lost revenues to record companies (which represents a significant amount of downloading activity), this is clearly an instance where the cost of enforcing copyrights would outweigh any amount record companies could hope to recover.

<sup>157</sup> Cohen, *supra* note 3, at 71 (comment of Val Azzoli, Atlantic Records Group co-chairman) (internal quotation marks omitted).

<sup>158</sup> *Id.* In addition, a further hurdle for Freenet is that because files are encrypted, it is impossible to know beforehand what the file actually contains. Thigpen, *supra* note 140, at 50.

<sup>159</sup> Napster I, 114 F. Supp. 2d 896, 927 n.31 (N.D. Cal. 2000) (discussing the formation of the Secure Digital Music Initiative, a consortium of record labels, consumer-electronic companies, and information-technology firms, and the various security measures it has undertaken). However, these efforts may have a limited impact. See Cohen, *supra* note 3, at 71 (noting the limited efficacy of security measures such as encryption and watermarks); Gibeaut, *supra* note 128, at 38 (quoting Charles Nesson, director of Harvard Law School's Berkman Center for Internet & Society, that "[t]he technological barriers are dropping almost to zero") (internal quotation marks omitted).

Ultimately, however, the best defense may be a good offense. "The surest protection against privacy is to make sure there's a high volume of quality, low-priced items on the market."<sup>160</sup> In this vein, one record company is gambling that the best solution to the current dilemma is to co-opt the competition. On October 31, 2000, the German media giant Bertelsmann, owner of BMG Music, the second largest record company in the United States in terms of market share,<sup>161</sup> stunned many when it announced it had dropped its lawsuit against Napster and formed a strategic alliance with the fledgling company.<sup>162</sup> The deal itself involves a forty million dollar loan from Bertelsmann in exchange for the right to acquire a majority interest in Napster.<sup>165</sup>

One of the biggest unresolved questions, and the reason why the proposed subscription service is so risky, is that nobody knows to what extent users weaned on the old Napster will be willing to pay. A number of empirical analyses have been performed, with widely varying outcomes.<sup>164</sup> In many ways, Napster is facing a unique problem with very few successful models to study. Several popular sites, such as Slate and TheStreet.com, tried to build subscription-based models and then quickly reverted to free services.<sup>165</sup> However, if Napster is able to survive initial losses in users, a significant up-side potential exists.<sup>166</sup> Assuming

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<sup>160</sup> Cohen, *supra* note 3, at 71. "There are lots of different tools available to labels to make a legitimate digital download more appealing to a consumer than a questionable digital download . . . [with items such as] lyrics, album art, connections to fan sites, [and] live tracks." Goodman, *supra* note 91, at 50 (internal quotation marks omitted).

<sup>161</sup> BMG collared 19.4% of the market in 2000. Other record labels making up the "Big Five" include: Universal (28%), EMD (8.7%), Warner/Elektra-Atlantic (13.5%), and Sony (15.4%). All told, these companies hold 85% of the United States market. See Goodman, *supra* note 121, at 21.

<sup>162</sup> Jefferson Graham, *Napster's Bertelsmann Alliance Isn't Music to All Ears*, USA TODAY, Nov. 2, 2000, at 1A.

<sup>163</sup> Mark Solomons, *High Fidelity*, FINANCIAL TIMES (London), Feb. 6, 2001, (Creative Business), at 10-11.

<sup>164</sup> A PricewaterhouseCoopers survey found that 75% of music downloaders would stop if they had to pay. Graham, *supra* note 17, at 1A. Another market research study cited by Bertelsmann of current Napster users shows that 70% are prepared to pay a membership fee. Harding, *supra* note 16, at 32. This Webnoize study, however, was contingent upon users having access to the current Napster, where virtually any song is available. "I'd be surprised if [ten] percent stayed aboard," says Webnoize analyst Ric Dube. *Get Ready to Pay for 'Free' Songs*, ARIZONA REPUBLIC, Feb. 4, 2001, at E9.

<sup>165</sup> D.C. Denison, *Pondering How Napster Can Make it to Pay Day*, BOSTON GLOBE, Feb. 4, 2001, at H1.

<sup>166</sup> Patricia Seybold, CEO of the Patricia Seybold Group in Boston and author of *Customers.com*, says: "I think Napster's eventual subscribers will be a fraction of the current number." *Id.* (internal quotation marks omitted). However, she cites *The Wall Street Journal's* online edition as a potential model: "When [*The Wall Street Journal*] instituted a paid subscription model, their subscription numbers plummeted to 100,000 or so . . . . Eventually they rose to about 250,000, where they have stayed. It's a much smaller number, but it's

that Napster is able to attract 20% of its peak level users and charges five dollars a month, this adds up to annual revenues of approximately 700 million dollars.<sup>167</sup> In addition, other potential revenue streams exist.<sup>168</sup>

Of course, Napster is not the only company getting into the online pay-for-music game. In early 2002, the major record companies finally unveiled their own music services.<sup>169</sup> Pressplay is a joint venture between Sony and Vivendi Universal, and RealOneMusic is owned by Real Networks, AOL Time Warner, EMI, and Bertelsmann AG.<sup>170</sup> Both services offer subscriptions that start around ten dollars a month.<sup>171</sup> Both services have glaring weaknesses, however, which include the fact that downloads expire if subscriptions lapse and limits, or outright bans, on burning songs to CDs.<sup>172</sup>

What is certain, however, is that any fee-for-music service faces a number of hurdles in order to effect a smooth transition from free to pay service. One such challenge is the daunting logistical feat of tracking billions of downloads by millions of users.<sup>173</sup> Another factor to deal with is improving the quality of service.<sup>174</sup> The third, and perhaps most important, issue is providing users with

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definitely a business." *Id.* (internal quotation marks omitted).

<sup>167</sup> Solomons, *supra* note 163, at 10.

<sup>168</sup> "There's no reason why Napster can't get three revenue streams going . . . . They can push subscriptions, advertising, and sales—of CDs, concert tickets, merchandise." Denison, *supra* note 165 (internal quotation marks omitted). Another possibility is for Napster to offer users a thirty-day free trial, similar to AOL, on the condition that users submit personal information, which could be used for direct marketing. Solomons, *supra* note 163, at 10.

<sup>169</sup> Fred Goodman, *Will Fans Pay for Music Online?* ROLLING STONE, Jan. 31, 2002, at 17.

<sup>170</sup> Don Clark & Lee Gomes, *Napster Settles Suits; Judge Says System Must Remain Shut*, WALL ST. J., July 13, 2001, at B6.

<sup>171</sup> Goodman, *supra* note 169, at 17.

<sup>172</sup> *Id.* at 17.

<sup>173</sup> To a certain extent, Napster and Bertelsmann's subscription service is not a new idea. In 1998, Gene Hoffman started an Internet music service, EMusic.com. Unlike Napster, Hoffman first secured licensing deals with record companies and recording artists and charged users a \$9.99 monthly fee. EMusic's initial public offering debuted at \$35 a share, settling in the mid-\$20s, until Napster destroyed its business model by offering music for free. Now the stock price is around \$0.50. Having already tackled the same business realities that Napster is soon to face, Hoffman warns:

It's not like they will just attach a meter to their service and start pulling in the money . . . . Once they start charging, it will change everything . . . . [For example,] they are going to have to pay the record companies and the songwriters. That's two payments per song. And they will have to build a centralized system to deal with billing and customer service. They are also going to have to settle on a security standard so the files can't be passed around. It's going to be a lot more work than they realize.

Denison, *supra* note 165 (internal quotation marks omitted).

<sup>174</sup> Seth Godin, former vice president of direct marketing for Yahoo! and author of the

access to the same variety of music to which they have been accustomed with free services.<sup>175</sup> Part of the appeal of the old Napster service was that almost *anything* was available on it.<sup>176</sup> Since Napster made the decision to move to a legitimate subscription service, it has been trying to convince record labels to drop their lawsuits and enter into licensing agreements.<sup>177</sup> This would allow Napster to have a critical mass of songs, making the service much more attractive. However, with the proliferation of new online services by record labels, this result seems unlikely, at least in the near future.<sup>178</sup> Most likely, any pay service that offers only a limited selection of music will have a much diminished appeal to users.<sup>179</sup> This lack of cooperation among record companies could be an egregious tactical error, as there simply may not be enough content on one label to justify the continued payment of monthly fees.<sup>180</sup> Further, the resentment caused by Napster may prevent the record labels from working together for some time.<sup>181</sup>

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book *Unleashing the Idea Virus*, says: "Napster is going to have to be [ten] times better, because they've already taught 50 million users that music can be free . . . . They have to prove they are worth paying for." *Id.* (internal quotation marks omitted). Such features would probably include enhanced security for file-sharing and improved sound quality. However, Scott Burnett, IBM's development executive for the global media and entertainment industries, says that even Napster's current model, whereby users supply content, could be made "legitimate and secure." Solomons, *supra* note 163, at 10 (internal quotation marks omitted).

<sup>175</sup> "Music fans really want the opportunity to choose from the entire body of recorded music," says analyst Eric Scheirer of Forrester Research in Cambridge, Massachusetts. "If we want to raise the price we're going to have to raise the opportunity." *German Media Firm Says Napster Will Charge Fees*, *supra* note 20.

<sup>176</sup> See Maconie, *supra* note 133:

Of course, if all that [Napster users] were doing was letting each other share the David Gray album and new Christina Aguilera single, Napster would be as dull as most radio stations and television pop shows. The point is that Napster is for mad people, impulsives, obsessives, people who know and care way too much about music. They really are sharing the theme from *Robinson Crusoe*, and *Danger Mouse*, and hardcore Belgian techno and old Sinatra rarities and horse-frightening modern jazz. There are some 265,000 pieces of music of every hue and genre.

<sup>177</sup> Harding, *supra* note 16, at 32; see also *supra* note 25 and accompanying text.

<sup>178</sup> Goodman, *supra* note 169, at 18. Besides Pressplay and RealOneMusic, two additional services, Full Audio and Rhapsody, are in the works.

<sup>179</sup> Phil Leigh, an analyst with investment banking firm Raymond James, stated that if a fee-based Napster service were able to offer music from the five major labels, "it's a 10, a huge deal," but that a service providing access to only two labels' catalogues would only be "a 3." Graham, *supra* note 17 (internal quotation marks omitted).

<sup>180</sup> Without the vast catalogue that is currently available on Napster, much of the value of a subscription-based music service, the element of choice and consumer control, is lost. A comparison of music to cable television, an industry with a successful subscription history, is enlightening. Cable television works because, by paying a flat rate, users pretty much get access to everything, from the major networks to ESPN to the History Channel. Different channels are worth more collectively than they are individually. People are willing to pay for the

Another factor cutting against Napster and other Internet music subscription services is the ready availability of Napster substitutes and enforcement problems.<sup>182</sup> As discussed in the preceding paragraph, this is especially problematic if these services fail to deliver the kind of selection that Napster formerly offered. Ironically, Napster may have done too good a job at pushing the demand for free music. Many Napster users considered themselves part of a large, communal music experience<sup>183</sup> and have expressed sentiments that Napster betrayed them by "selling out."<sup>184</sup>

In many ways, Napster was about not only sharing music but also communicating, whether intended or not, an implicit belief about the proper reach of copyrights. For almost two years, people became accustomed to sharing and downloading free music on Napster, and, at the same time, they began to reconceptualize how and in what circumstances they should be charged for access to music.<sup>185</sup> The record industry reported that it lost 4.5 billion dollars to pirates in 1999, mainly through counterfeit hard copies of CDs.<sup>186</sup> The ideology that Napster helped create turns this claim on its head: record companies are not losing money from PTP file-sharing because they never had the right to control or

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convenience of multiple options, even though they may not watch a majority of programs on any one channel. Asking users to subscribe to each separate record label's service is like asking them to subscribe separately to every television channel they watch.

Music is also dissimilar from television in two key respects which bode unfavorably for a subscription model. First, television produces a superior amount of new content. Compared to an average television program, which airs approximately twenty-five new episodes a season, even the most prolific of recording acts would be hard pressed to record more than ten hours of music in an entire career. As such, most of the value of a music subscription service lies in the record companies' archives, the back catalogue of recordings that would be available. See Cohen, *supra* note 3, at 69. Second, music as an artistic paradigm is much more dependent on repeat listening than television is on repeat viewing. See Gibeaut, *supra* note 128, at 41. While people usually only watch most programs once or twice, music fans listen to their favorite songs and albums over and over.

<sup>181</sup> This tension is evidenced by the different approaches record labels have taken towards dealing with Napster, particularly Bertelsmann. Bertelsmann's announcement of its deal with Napster and its subscription service met with a tepid response at the World Economic Forum in Davos, Switzerland, including the chairs of Sony and Vivendi-Universal. Peter Capella, *Napster to Charge Online Song Swappers*, THE GUARDIAN (London), Jan. 30, 2001, at 26.

<sup>182</sup> See *supra* Part IV.B.

<sup>183</sup> See *supra* note 133 and accompanying text.

<sup>184</sup> "I believe Napster's sole idea of the future was to be part of the money-hungry record industry," says one Napster user. Graham, *supra* note 162 (internal quotation marks omitted). Another Napster user shares, "[Napster is] a sellout . . . Music prices are already too high, and for them to charge for this too is wrong." Graham, *supra* note 116 (internal quotation marks omitted).

<sup>185</sup> See *supra* notes 129-35 and accompanying text.

<sup>186</sup> Gibeaut, *supra* note 128, at 38.

restrict this sharing of music in the first place.<sup>187</sup> A subscription-based Napster may suffer from the very sentiments it helped popularize.

#### *D. Looking to the Future*

For the foreseeable future, the music industry will be in a state of flux as the three forces discussed previously in Part IV—normative philosophies, enforcement issues, and market factors—interact in an attempt to find a state of equilibrium. What exactly the outcome will be remains uncertain. A page of history is worth a volume of logic. However, with approximately 14.6 billion dollars in annual revenue at stake,<sup>188</sup> one certainty is that record companies will be vigorous in their efforts to maintain the commercial value of their copyrights.

Most likely, the music industry will first attempt to undercut the momentum of free services like Freenet and Gnutella by competing with them in the marketplace.<sup>189</sup> As discussed, though, market solutions will likely provide only a partial fix.<sup>190</sup> Free services will most certainly divert users from fee-based subscription services, but the key question is to what extent. It remains to be seen whether the more radical philosophies underlying Napster and its progeny<sup>191</sup> will continue to hold popularity. Napster is a social phenomenon, but it may be a short-lived one.

If a significant number of Napster users do defect to free services, the next logical action taken by record companies will be to sue individual users of these services.<sup>192</sup> Most likely, this would involve strategically filing suits against high-profile individuals (those who are the most egregious examples of copyright infringers)<sup>193</sup> in an attempt to maximize deterrence value while minimizing public backlash.<sup>194</sup> If the situation becomes more precarious for the record companies, one could witness lawsuits filed to enjoin programmers from distributing software that is especially well-suited for facilitating copyright infringement on the

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<sup>187</sup> In the course of researching this note, the author conducted several informal interviews with fellow law students who have used Napster in order to glean insight into their perceptions on the service. Although most likely an attempt to rationalize their actions at least in part, a surprising number of students felt no moral conflict downloading songs from Napster, contending that they primarily used Napster to download songs they otherwise would *not* have purchased. In other words, Napster merely allowed them personal use and enjoyment of songs heretofore unavailable.

<sup>188</sup> Gibeaut, *supra* note 128, at 38.

<sup>189</sup> See *supra* Part IV.C.

<sup>190</sup> See *supra* notes 173–87 and accompanying text (detailing the numerous obstacles that a full-fledged subscription-based service will face).

<sup>191</sup> See *supra* notes 129–35 and accompanying text.

<sup>192</sup> See *supra* notes 150–56 and accompanying text.

<sup>193</sup> See *supra* note 150.

<sup>194</sup> See *supra* notes 152–53 and accompanying text.

Internet.<sup>195</sup> Through these legal and public relations battles, each side will continue to challenge the other's philosophical and economic commitment to its position until ultimately one backs down.

The preceding discussion details the process that will most likely ensue as the music industry attempts to protect the commercial value of its copyrights. It also demonstrates that, while uncertain, the ultimate resolution of this process will largely depend upon one question: Is the popularity of Napster truly indicative of a fundamental shift in how people conceptualize the proper role of copyright in music and society at large, or is it merely the result of people trying to get something for nothing? The answer has ramifications worth billions of dollars.

## V. CONCLUSION

The social phenomenon known as Napster has already opened a Pandora's Box, and the music industry's enforcement of copyright will never be the same again. In the span of a few short years, a software program developed by a nineteen-year-old college freshman has developed into the fastest-growing service in history, accumulating over fifty million users by early 2001.<sup>196</sup> This same software program has managed to galvanize numerous factions in the artistic, business, and legal communities in a way that few other issues have in recent memory. The legal fate of Napster as a free service, however, already appears ordained, and in many ways it is surprising to note how blasé Napster was about its potential infringement liability.

The likely outcome of the Napster litigation, though, will not conclude the matter. Underlying the rise of Napster, one discerns burgeoning progressive—or radical, depending upon one's views—social theories. Napster involved, at least in part, not only an entirely new method of distributing music but also a new ideology. The popularity of Napster has allowed many to reexamine the degree to which, and under what circumstances, copyright holders should be able to control the dissemination of artistic content, or at least music, in society. Coupled with the inherent difficulties in enforcement and the likely limited ability of the marketplace to provide a solution, the music industry faces an uphill battle.

The exact degree to which the music industry will be transformed by the social forces unleashed by Napster remains to be seen. The foreseeable future, however, will most likely involve a series of legal, commercial, technical, and ideological encounters as record companies seek to preserve the commercial

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<sup>195</sup> In fact, this situation has already occurred, albeit in the movie industry context. On August 17, 2000, U.S. District Judge Lewis A. Kaplan ordered Eric Corley to remove a program called DeCSS, which allows users to decode and transfer DVDs over the Internet, from the web site of his magazine. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

<sup>196</sup> Harding, *supra* note 16, at 32.



value of their copyrights. Ultimately, the long-term outcome will largely depend upon the extent to which Napster's rise in popularity was truly indicative of a normative re-conceptualization of the proper role of copyright in music and society at large.

